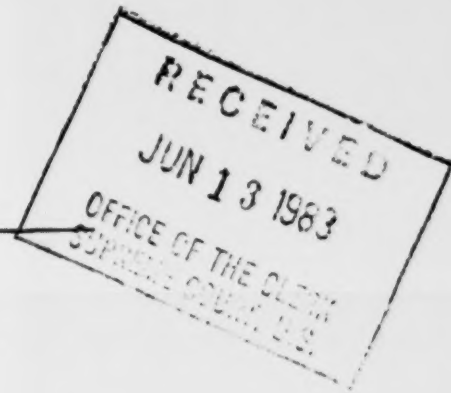


ORIGINAL

NO. 82-1739



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

FUNDACION EDUCATIVA ANA G. MENDEZ
JOSE F. MENDEZ, ET AL.,

Petitioners

vs.

ARSENIO E. SUAREZ, ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF PUERTO RICO

BRIEF FOR PRELIMINARY OPPOSITION

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COURT OF PUERTO RICO

BRIEF FOR PRELIMINARY OPPOSITION

Petitioner's references to the opinion below to jurisdiction of this Court on a Petition for Certiorari are correctly set forth.

I. Question Presented

The "questions presented" as stated by Petitioner are not correct and do not set forth the basis for the opinion of the Supreme Court of Puerto Rico nor properly reflect the record nor the basis for the Commonwealth of Puerto Rico Supreme Court's decision.

The question presented by this case is whether petitioner, after having unilaterally promulgated a set of regulations

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whereby tenured professors had to be given the opportunity of a full administrative hearing before their employment could be terminated, could annul said rights and dismiss respondents from their positions since respondents' union had not notified the Secretary of Labor of the termination of the collective bargaining agreement between petitioners and respondents' union and respondents' participation in a strike was thereby illegal under the Taft-Hartley Act.

The Supreme Court of the Commonwealth of Puerto Rico found that there was a notable difference between the action on contract filed in the Commonwealth court and the complaint filed before the National Labor Relations Board for unfair labor practices. The court's intervention, said the Commonwealth Supreme Court, does not preempt the field reserved to the Board. Sears Roebuck v. Carpenters, 436 U.S. 180 (1978). Furthermore, the Supreme Court of Puerto Rico held that the termination of the collective bargaining agreement did not necessarily abrogate the guarantees offered by respondent's statutes regarding faculty tenure. These rights, the Commonwealth Supreme Court decided, remained in force ex proprio vigore and petitioners had the obligation to follow their own regulations before terminating respondents from their tenured positions. Hence, respondents had to be reinstated to their positions as full-time professors.

II. STATEMENT OF THE CASE

The Respondents, Berta Gallego and Diana Rodríguez, oppose the Petition for Writ of Certiorari on the grounds that the Superior Court and the Supreme Court of the Commonwealth of Puerto Rico correctly decided the issues in this case. Petitioner filed

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for a Petition for Appeal and/or Revision before the Supreme Court of Puerto Rico and the same was denied on January 18, 1983.

A request for stay of the mandate was filed before this Court by petitioner. The same was preliminary granted by Associate Justice Brennan but upon further consideration was subsequently denied on March 31, 1983. This petition for writ of certiorary was subsequently filed by petitioner.

III, STATEMENT OF FACTS

Respondents 1/, university professors and members of the faculty at the Puerto Rico Junior College, were summarily dismissed from their employments. The Puerto Rico Junior College is owned and operated by respondent Fundación Educativa Ana G. Méndez. At the time of their dismissal respondents were all full-time permanent faculty members at said institution. The reason given by petitioner for the dismissal of respondents was respondents' alleged participation, as members of the Asociación de Maestros Universitarios ("A.M.U."), in a strike that the Fundación classified as illegal, in absence of a Court's or an agency's determination to that effect.

The Fundación and the teachers' Association were parties to a collective bargaining agreement covering the period from November 1, 1975 through October 31, 1978. The dismissal of

1/ Thirty eight faculty members were included as plaintiffs in the original complaint. As of this date, thirty six of the original plaintiffs have accepted settlement offers made by petitioner. Two plaintiffs remain in the case and have been included in the Fundación's payroll collecting their salaries since February 15, 1983.

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respondents occurred on May 7, 1979, that is, six (6) months after the expiration of the contract and during the negotiations of a new contract. Petitioner's Board of Directors approved the Puerto Rico Junior College's Statutes and Faculty Handbook, which read, in its pertinent parts, as follows:

"Section 32 - Faculty members may have tenure after five years of consecutive full time service to the College and a favorable evaluation under rules and procedures approved by the Administrative Council. Cause for the termination by the Foundation of the tenure of a faculty member by discharge shall consist of conduct seriously prejudicial to the College through infraction of law or commonly accepted standards of morality, neglect of duty, inefficiency, or incompetency. The enumeration of causes for discharge shall not be deemed exclusive and the Foundation shall retain the power to discharge a member of the staff or to refuse to renew a contract or employment for any cause which, in the judgment of the Foundation may seem valid. Such action will not be taken until the faculty member has not had an opportunity for hearing before the Academic Board, as contemplated in a preceding paragraph, then he shall be entitled to a hearing before the full Administrative Council or a committee of the Council, as the council may determine. It his privilege of being accompanied by an advisor or counsel and a full magnetophonic or stenographic report of the hearing shall be kept. In either case, the issue will be determined by an equitable procedure affording protection to the rights of College. After the decision by the Administrative Council, the record of the case shall be transmitted by the Chancellor to the President of the Foundation within 72 hours." (See Petitioner's Exhibit A, Page 3.

The statutory provision transcribed herein, establishes the procedural right of every faculty member, permanent or with more than two (2) years at the institution, of not being deprived of his teacher's status without due process of law. In said section 32 of petitioners' Faculty Handbook, it is established the right, even in cases of unlawful conduct, to a hearing before the

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Academic Board and the Administrative Council prior preferment of charges, including the right to be assisted by counsel in said hearing.

Neither the Puerto Rico Junior College, nor the Fundación, petitioners in the instant proceedings, granted respondents faculty members an administrative hearing prior to their summary dismissal, with the subsequent loss of respondent's rights as faculty members. There was no prior formulation of charges by petitioners. On the contrary, petitioners summarily dismissed respondents.

On May 24, 1979, respondents filed a suit in the Superior Court of Puerto Rico alleging a breach of contract, deprivation of their rights as a faculty members and requesting reinstatement and damages. Three (3) years later, on April 29, 1982, the Commonwealth Superior Court issued a Summary Judgement in favor of respondents. On June 29, 1982, the Supreme Court of Puerto Rico dismissed for lack of jurisdiction an appeal filed by petitioner on the grounds that it did not raise a substantial constitutional question.

On January 18, 1983, the Supreme Court of Puerto Rico, modified and affirmed the judgment of the Superior Court. The Supreme Court of Puerto Rico subsequently denied petitioners' request to stay the mandate on February 10, 1983 and the mandate was remitted to the Superior Court. This Petition for Certiorari was then filed by petitioners in this Court.

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IV. ARGUMENT

A. There Is No Constitutional Issue in the Present Case

First of all, the Supreme Court of Puerto Rico did not decide the present case on the basis of a controlling constitutional issue. It should be noted that petitioner's Request For Appeal before the Supreme Court of Puerto Rico was originally denied for lack of jurisdiction on the grounds that it did not raise a substantial constitutional question. The final judgment of the Supreme Court was based on the breach by petitioners of the contractual obligations that they had with respondents as tenured professors of the institution. Said judgment stated:

"There is a notable difference between the action on contract filed with the court, and the complaint filed before the N.L.R.B. for unfair labor practices (refusal to bargain the evaluations for tenure and other particulars), thus, the Superior Court's intervention does not preempt the filed reserved to the Board." (Sears Roebuck v. Carpenters, 436 U.S. 180 (1978)).

Having the Supreme Court of Puerto Rico failed to pass upon a federal question is up to petitioner to show that the federal question was properly and timely raised in the Commonwealth courts. Street v. New York, 394 U.S. 576, 582. Bailey v. Anderson, 326 U.S. 203, 206-207). In the instant case the Supreme Court of Puerto Rico did no more than discuss the interpretation of the contract provisions between the parties, without considering such interpretation in light of a federal question properly presented to it. Beck v. Washington, 369 U.S. 541, 549-550.

B. The Preemption Doctrine Under the Taft-Hartley Does Not Apply in the Instant Case

In Garmon ^{*}/, this Court described two types of conduct that fall beyond the reach of the basic labor law preemption doctrine:

(1) Conduct that touches interests deeply rooted in local feeling and responsibility, and

(2) Conduct with which the Labor Management Relations Act is only peripherally concerned.

In the present case, respondents had the right to a hearing before the Academic Board and the Administrative Council of the institution prior preferment of charges, including the right to be assisted by counsel in said hearing, whenever the institution considered that a professor had violated any statute. See, Faculty Handbook, supra. This right had been promulgated by petitioners before the collective bargaining agreement was negotiated between petitioners and respondents' union and the same was conferred and recognized to all members of the faculty, notwithstanding the fact that they did not belong to respondents' union since an open shop agreement was contemplated in the agreement.

Upon being summarily dismissed by petitioners from their tenured positions, respondents filed the present action

*/ San Diego Building Trade Council v. Garmon, 359 U.S. 261 (1959)

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before the Commonwealth courts seeking reinstatement and damages due to petitioners' violations of their own statutes and regulations. Herein respondents could not file charges before the National Labor Relations Board requesting reinstatement since the Board does not have any jurisdiction to entertain this type of action. Respondents utilized the only mechanism that was afforded to them since petitioners had also expressed that the grievance provisions of the collective bargaining agreement were no longer applicable since, petitioners contended, the agreement had terminated.

In essence, the rights of herein respondents originate from a completely different source than that of the collective bargaining agreement. They stem from petitioners' regulations which conferred the abovedescribed rights to herein respondents. These rights remained in force after the collective bargaining agreement terminated. Petitioner's attempt an eleventh hour motion to have this Court decide that a new exception to the Federal preemption doctrine has been created by the courts of Puerto Rico is clearly futile and with no consequence whatsoever. As correctly stated by the Supreme Court of the Commonwealth of Puerto Rico:

"The termination of the collective bargaining agreement did not necessarily abrogate the guaranties offered by the Statutes of the Junior College regarding faculty tenure. Some prior agreements subsist are not incompatible with the collective bargaining agreement. J. I. Case v. NLRB, 321 U.S. 332.
(3) These prior agreements-contained in statutes and regulations-that guaranteed fair treatment both to the Association's members

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and to nonunion personnel, are still in force with the basic protection given to all, thus there was no substitution or novation of the same when the collective bargaining agreement was executed."

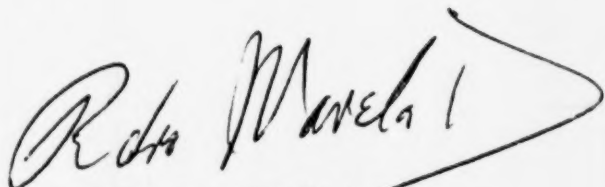
Finally, it should be mentioned that only two professors remain as respondents in this case since the rest have already reached out-of-court settlements in the present action. These two professors have exercised the only right that they could utilize in order to seek vindication from the courts of the Commonwealth of Puerto Rico.^{*/} Cf. Carey v. Westinghouse Electric Corp., 375 U.S. 261, 11 L Ed 2d 320 (1964).

V. CONCLUSION

WHEREFORE, this Court should denied the Petition for a Writ of Certiorary filed in the present case.

In San Juan, Puerto Rico, this 9th day of June, 1983.

CERTIFICATE OF SERVICE on this same date to José Añese Peña, Domenech No. 220, Hato Rey, Puerto Rico 00917; Attorney Daniel R. Domínguez, P.O. Box 1732, Hato Rey, Puerto Rico 00919; Saul G. Kramer, 300 Park Avenue, New York, New York 10022.

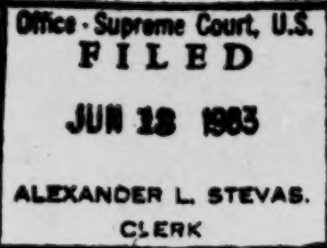


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^{*/} Local 926, Operating Engineers v. Jones, US, 51 LW 4343, is different from the case at bar since the unfair labor practice charge herein involved was directed toward the union's conduct and not against herein respondents as it was in Local 926.

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Respondents

MOTION TO PROCEED IN FORMA PAUPERIS
TO FILE OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARY TO THE SUPREME COURT OF
THE COMMONWEALTH OF PUERTO RICO

PEDRO J. VARFLA
Counsel for Respondents
Ponce de León 613
Hato Rey, Puerto Rico 00917
Tel: (809) 751-6351

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

FUNDACION EDUCATIVA ANA G. MENDEZ
JOSE F. MENDEZ, ET AL

Petitioners

vs.

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Respondents

No. 82-1739

MOTION TO PROCEED IN FORMA PAUPERIS TO FILE OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE COMMONWEALTH OF PUERTO RICO

TO THE HONORABLE COURT:

Come now respondents, through counsel, and respectfully request permission to proceed in forma pauperis on the following grounds.

1. Respondents were dismissed from their employments more than 5 yearas ago. Petitioners dismissed respondents from their jobs as teachers and the Supreme Court of Puerto Rico reinstated respondents to their positions.

2. Respondents were not able to find a permanent job during this time and have not received any payment from the decision rendered by the Supreme Court of Puerto Rico.

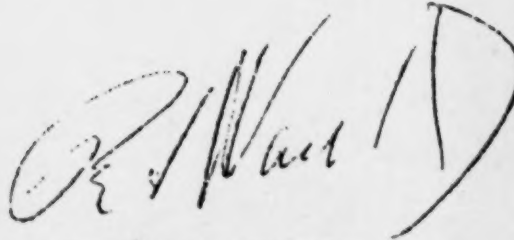
3. Petitioners do not have the economic resources to prosecute this action and request to do the same in forma pauperis.

CERTIFICATE OF SERVICE on this same date to Attorney

Daniel R. Dominguez, P.O. Box 1732, Hato Rey, Puerto Rico 00919:

Saul C. Kramer, Esq., 300 Park Avenue, New York, New York
10022.

In San Juan, Puerto Rico, this 15th day of June, 1983.

A handwritten signature in dark ink, appearing to read "Pedro J. Varela", with a large, stylized flourish at the end.

PEDRO J. VARELA
Ponce de León 613
Hato Rey, Puerto Rico 00917
Tel: 751-6351

SWORN STATEMENT


WE, BERTA GALLEGO and DIANA RODRIGUEZ DE AYGUABIBAS, of legal age, married and residents of San Juan, Puerto Rico.

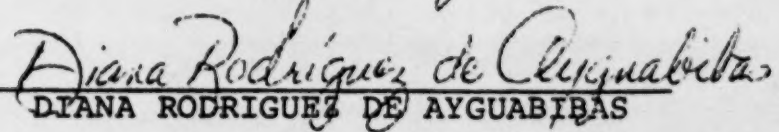
1. That our names and personal circumstances are as hereinbefore stated.

2. That this petition to proceed in forma pauperis has been drafted by our lawyer according to data we have given to him and that everything contained therein is true, from our own personal knowledge.

3. That what has been herein before expressed is the truth.

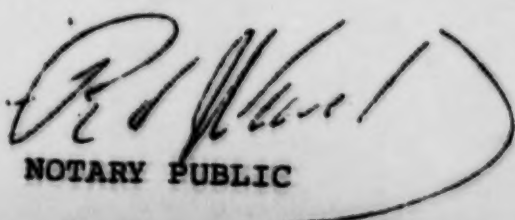
We hereby subscribe and attest, In San Juan, Puerto Rico, this 15th day of June, 1983.


BERTA GALLEGO


DIANA RODRIGUEZ DE AYGUABIBAS

Affidavit No. 1389

Sworn and subscribed before me by Berta Gallego and Diana Rodríguez de Ayguabibas, of the above personal circumstances, to me personally known. In San Juan, Puerto Rico, this 15th day of June, 1983.


NOTARY PUBLIC

